Transition without Transformation: Legal Reform in the Democratization and Development Processes

Ermal Frasheri

Follow this and additional works at: https://digitalcommons.law.lsu.edu/jcls

Part of the Civil Law Commons

Repository Citation
Available at: https://digitalcommons.law.lsu.edu/jcls/vol4/iss1/4

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.
TRANSITION WITHOUT TRANSFORMATION:
LEGAL REFORM IN THE DEMOCRATIZATION
AND DEVELOPMENT PROCESS

Ermal Frasheri*

I. Abstract ........................................................................................................................................ 60

II. Introduction ................................................................................................................................... 61

III. Chapter One: Twenty Years of Transition: Politics and Actors........................................................ 69
    A. Politics of Transition and Transformation .............................................................................. 70
    B. Actors of the Lawmaking Process .......................................................................................... 78

IV. Chapter Two: The Traffic of Legal Norms ...................................................................................... 86
    A. The Supply and Demand of Transplants: Diversity of Origins—Diversity of Results .............. 88
    B. A Comparative Perspective of the Legislative and Constitution Making Process ................... 95

V. Chapter Three: Proposals for the Future of the Lawmaking Process .................................................. 102

* S.J.D. Candidate, Harvard Law School; Adjunct Professor, New England Law-Boston.

I would like to thank my mentor and supervisor Professor David Kennedy, who greatly influenced me in writing this paper. I would also like to express my gratitude to my colleagues Francesca Strumia S.J.D. and Arnulf Becker, S.J.D. In particular, I would like to thank my colleagues at the Ministry of Justice and Ministry of European Integration in Albania, as well as my colleagues at the Center for Micro Finance in Nepal. Special thanks go to participants of the Harvard European Law Association Working Papers Series, Cornell Law School Graduate Students Conference, and Osgoode Hall Law School conference on “The Boundaries of Modern Law,” for their most helpful comments, critique and suggestions. Nelly Wadsworth and Joni Hagigeorges were invaluable in making this paper happen. Last but not least, I would like to thank Professor Olivier Moréteau, reviewers and editors of the Journal of Civil Law Studies for their continuous support in editing and publishing this paper.
I. ABSTRACT

Modernization relies on law as the means of transformation. Democratization and development strategies of the last 20 years, such as the Washington consensus and its successor: good governance and institution building, have embraced the instrumentalization of law in order to create democratic societies and market economies. In these great processes of transformation, from regime changes in Eastern Europe to state building across Central Asia, the process of lawmaking rests upon premises that have a tendency to perpetuate transition without transforming the relationship of the individual to power. This alienizing feature of transition is reflected in lawmaking practices. In this paper, I argue that a wider participation in the lawmaking process enhances the legitimacy of the democratic regime, and it helps to fill the gap between the law in the book and the law in action. I rest my thesis on the premise that the reformation of laws, and therefore the system, is characterized by a dichotomy between the legality and the legitimacy of the lawmaking process. I analyze and expose two different and contradictory patterns that are inherent in lawmaking processes in countries in transition. On the one hand, a rule of law society presupposes clear, transparent and predictable rules, a certain formalism associated with modern states and societies. On the other hand, the flexible nature of transition demands solutions outside the legal framework. I use dichotomies such as legality and legitimacy, expertise and wider participation to analyze the contents of lawmaking practices as well as the role of international actors and elites in the democratization and development process. Juxtaposing transformation with participation, this paper elucidates the practices of modern lawmaking in societies in transition.

I should have sought a country, in which the right of legislation was vested in all the citizens; for who can
judge better than they of the conditions under which they had best dwell together in the same society?

Jean Jacques Rousseau,

*Discourse on the Origin of Inequality*

II. INTRODUCTION

The process of transition from one political regime to another, in the last twenty years, has required structural political and economic reforms. These reforms in turn have relied on the role of law as an instrument of social change.\(^1\) Thus for instance, the political and economic changes of the 1990s in Eastern Europe were followed by the establishment of a new legal order, which was necessary to foster democratization, and create the market economies.\(^2\) On the economic front, the transformation of Eastern Europe in the early 1990s followed the model of shock therapies prescribed in the Washington consensus as quick liberalization, privatization and stabilization.\(^3\) During these great processes of transformation, the social dimension of the state was either

---


2. In contrast to the democratization in Eastern Europe, a post third wave of democratization in Central Asia seems to rely more upon conventional norms of democratization through Constitution making and power sharing agreements. In Nepal, for instance, the process of transition from monarchy towards a republican form of government is relying almost exclusively on the adoption of a Constitution, which is one of the conditions of the peace process between the Maoist guerrillas and the former royal army. See Reports of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of its Peace Process, available at [http://www.ohchr.org/EN/Countries/Pages/SecretaryGeneralReportsNP.aspx](http://www.ohchr.org/EN/Countries/Pages/SecretaryGeneralReportsNP.aspx) (last visited April 21, 2011).

abandoned or relegated to the exigencies of the market. At this moment, we come across the first paradox of transition. On the one hand, legal reform aims at democratizing the societies and creating the necessary legal framework that would legitimize the new regime. The assumption is that legal reform would either be forward or backward looking, leading or following social developments, attempting to formalize or regulate them. It does so, however, by following one of the two dogmas of development, i.e. the neoliberal model or the good governance and institution building. In both paradigms, the emphasis is on economic reforms and institutions rather than on maintaining the social dimension of the state.

On the other hand, the abandonment of the social role by the state undermines the legitimacy of the new democratic regime. This becomes particularly acute when considering that the totalitarian regime based its legitimacy on performance, that is to say on the role of the state as a social regulator. Since most of the new governments face an uphill battle regarding performance, the social dimension of the state is reduced while the performance is simply not there. In a situation where constituents perceive the legitimacy of regimes connected closely with performance, the withdrawal of the social elements threatens the legitimacy of the new democracies. Further, the method of reformation exacerbates the distrust towards governments, and in turn the legitimacy of the law. The reforms are typically adopted on the basis of a top-down approach that tends to reinforce the belief that transition is permanent. The process of establishing a new legal order is conditioned by the relationship between domestic and international actors. The latter have influenced the understanding of law and also stimulated the need for legal reform projects. This immense legal reform took place in all former socialist countries, in what

4. While the state was obliged to abandon the regulation on social services, that did not mean that society was left unregulated. The emergence of informal law filled the vacuum left in place by the withdrawal of the state.

5. See Peter Fitzpatrick, The Mythology of Modern Law (1992) (when discussing the presumption that law and society are inseparable and that law governs all men).

6. It should be said the in recent years the two paradigms are not mutually exclusive.
Gianmaria Ajani calls an international traffic of legal ideas. It is worth emphasizing that the existence of a legal base does not automatically translate into optimal operation of laws in everyday life. The large number of laws adopted, or what I call “the inflation of legislation,” is devoid of any significant impact on how the society functions.

There are two features inherent in the transition process. The first is characterized by the problematic nature of reforms themselves; the second refers to the process through which these reforms are adopted. In this paper, I use a dichotomy between the legality and legitimacy of legal reform projects to analyze the practices of actors involved in lawmaking. Against this background, I argue for a more participatory process of reforms as a step for adding legitimacy to the new regime, and also subsequently to the transformation process itself. In turn, this increased participation contributes towards enhancing the legitimacy of laws. A wider participation of the public is necessary to ameliorate the alienation in the relationship of the individual to governance and government. The problem identified in democratization processes is that there is transition without transformation of the relationship of the individual to power. While participation could add legitimacy to laws and address the democratic deficit, it does not necessarily follow that the process itself is the only missing piece of the puzzle.

8. On the lack of a theory on large scale institutional transformation see Matjaz Nahtigal, Remarks, in Alexander N. Domrin et al., Ten Years of Legal Reform in the Former Soviet Union: A "Progress" Report, 93 PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 235, 239 (1999) (Matjaz states that “Central and Eastern Europe had no broad theoretical knowledge on how reform is to be coordinated among several branches of government, or between the government and the private sector, the government and civil society or the government and pressure groups. We had no experience on how to run things without the government. So the immediate withdrawal of government from every level of society caused an institutional vacuum, which did not allow for development to arise from the bottom up, but, rather, generated an intermediate struggle for private ownership.”).
9. I adopt a wide definition of the public as essentially including anyone with a representative function, and, of course, elites.
10. For an account of the need for local actors to understand legal norms see Daniel Berkowitz et al., The Transplant Effect, 51 AM. J. COMP. L. 1,
the paradigms of change, such as the neoliberal prescriptions as well as the good governance and institution building, on which democratization and development are premised, ought to be addressed as well. However, for the purpose of this paper, I focus on the dynamics of the process. A wider participation is one of the components of a successful transformation process, along with the nature of the development paradigms, institutional capacities, and the political will of the elites.\footnote{11}

The goal of this paper therefore is to examine the nature of the transition process as it is reflected in the operation of legal reform programs and lawmaking practices. This analysis and approach are in the function of exposing two different and contradictory patterns that accompany the lawmaking process in transitional countries. On the one hand, the contemporary understanding of a rule of law

163 (2003), and Katharina Pistor, \textit{The Standardization of Law and Its Effect on Developing Economies}, 50 AM. J. COMP. L. 1, 97 (2002). Berkowitz writes that for law to be effective it has to be meaningful in the context in which it is applied, while Pistor makes a reference to the need for embedding laws in a local culture. \textit{But see} Kevin E. Davis \& Michael J. Trebilcock, \textit{Legal Reforms and Development}, 22 THIRD WORLD Q. 1, 21 (2001), and Thomas W Waelde \& James L. Gunderson, \textit{Legislative Reform in Transition Economies: Western Transplants: A Short-Cut to Social Market Economy}, 43 THE INT’L AND COMP. L. Q. 2, 347, 361 (1994) (for an account on the need for institutions in transition). Davis and Trebilcock argue that the current wave of legal reforms must be situated in a broader agenda of public sector reform if these are not to suffer the same fate as the reforms inspired by the original law and development movement. Waelde and Gunderson write, “any effort at mere legislative reform will fail if it does not cover as well, or more so, the challenges of helping to build up the organisations required and the institutional environment within which a legal culture can emerge and flourish. Substantive legal reform and institution building must therefore be implemented together so that each reinforces the other . . . The effectiveness of law in the economic and social reality of a nation is usually intimately linked to the institutional set-up of government and economic organisations and the shape and focus of social and economic forces and their interaction.” While this is true that one needs a bureaucracy to enforce laws, I argue that one cannot rely only on the existence of a bureaucracy in transitional societies, where by definition state structures are weak. Hence, there is a need for participation to alleviate legitimacy and implementation.

For the purpose of this paper, I define “elites” as political actors, including members of parliament, senior government officials, and also legal professionals, the latter essentially constituting a lawmaking group. Regarding the role of lawyers as an elite group, \textit{see} William Ewald, \textit{The Logic of Legal Transplants}, 43 AM. J. COMP. L. 4, 489, 499 (1995) (Ewald writes that lawyers constitute an elite lawmaking group).
society calls for clear, transparent, and predictable rules, a certain formalism in the societal interrelations. On the other hand, the fluid nature of transition demands solutions outside the legal framework. In this context, it is necessary to note that there is more to the effectiveness and legitimacy of a normative order than technical considerations dictated by experts. The legitimacy of law, where legitimacy means acceptance as the basis of social coordination, requires a social and political foundation.\footnote{12} This raises the need to ensure a democratic and participatory process of lawmaking, which is able to give legitimacy to adopted laws, and prevent lawmaking within closed door chambers.

In this paper, I draw from the experiences that I had while I was working on legislative policies at the Albanian Ministry of Justice. I also draw upon a more modest experience in Nepal where I was drafting a key piece of the legal framework on microfinance. What makes studying the Albanian legislative process interesting and relevant to the contemporary processes of state building, democratization and development is the degree and complexity of experiments done and still being done today in reforming the political landscape, economy, society and the legal system. In that milieu are embedded all versions of Frankenberg’s comparative lawyer, as well as successive mutations of comparative law in

\footnote{12}{See Scott Newton, Transplantation And Transition: Legality And Legitimacy In The Kazakhstani Legislative Process, in LAW AND INFORMAL PRACTICES, THE POST COMMUNIST EXPERIENCE 151 (Denis J. Galligan & Marina Kurkchiyan eds., 2003). Newton argues that foundation can be based on interaction and reciprocity. For other accounts of legitimacy in legal reforms see generally Samuel J. M. Donnelly, Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions, 603 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES, LAW, SOCIETY AND DEMOCRACY: COMPARATIVE PERSPECTIVES 37, at 44 (2006). Donnelly writes that changes or developments in law or legal institutions can enhance the legitimacy power of the courts or society or they can produce legitimacy costs. Legitimacy power can accumulate slowly during a sequence of law reform or over the history of an institution. Thomas Franck writes, “legitimacy is the quality of a rule, or a system of rules, or a process for making or interpreting rules that pulls both the rule makers and those addressed by the rules toward voluntary compliance. Thomas M. Franck, The Emerging Right to Democratic Governance, 86 AM. J. INT'L L. 46, 50 (1992). Duncan Kennedy also provides a series of contexts in which emerges the concept of “legitimacy power.” Duncan Kennedy, Freedom and Constraint in Adjudication, A Critical Phenomenology, 36 J. OF LEGAL EDUC. 518 (1986).}
action. Those in turn, are associated with differing political wills and legacies of the multitude of domestic and international actors.

The first Chapter looks at the practices and requirements of the lawmaking process, thus illustrating the dynamic of the early years of transition, which are common to all transitioning countries. It provides a narrative of the political transformation process and discusses the rise of the informal sector. I also map key actors of legal reforms. Taking into consideration the horizontalization of lawmaking, the role of various institutions and exogenous actors that participate in reforming the system is analyzed against the dichotomy of informal and formal norms inherent in a transition process.

The second Chapter probes the relationship between the legality and the legitimacy of the lawmaking process. In discussing the lawmaking methodologies, I analyze this relationship vis-à-vis the legitimacy derived from a democratic lawmaking process. The methodologies of reforming the legislation reflect the background and assumptions of the actors involved. In this context, as Ajani puts it, one could speak in terms of an offer and demand of legislation. This approach highlights the effect of the diversity of origins of laws introduced to the legal system.

The lawmaking practices raise more questions than answers vis-à-vis the compatibility, adaptability and functioning of legislation originated from different legal systems, the enforcement of standards and norms in local communities, and the compliance with requirements of public participation. They also open the Pandora box regarding the implications of adopting international standards, and the role of international organizations as providers.


14. For instance, international organizations and foreign donors’ projects were aimed at incorporating international standards as well as relying heavily upon harmonizing laws with existing standards by mostly transplanting legislation of developed countries, but not only. When OSCE was advising Albania to revise its Election Code, legal sources as far dispersed as those from the former Zaire to Azerbaijan were presented as examples. I had just started working at that time, in the summer of 2000, and the materials were on my own desk.

15. Ajani, supra note 7, at 97.
of expertise and norms. One of the problems associated with legal reforms projects is the emphasis on the technical rather than political or social nature of expertise.\textsuperscript{16} While this approach allows legal work to be carried out even in those areas considered inherently political with the justification that it could increase the legitimacy of the outcome through prestige, more often then not the result is the contrary. The recipients of laws often stay outside the political and lawmaking process, which in turn is conditioned by the central influences of domestic elites and international factors.

The methodology of preparing laws, within the technical assistance framework provided by international actors has changed twice in the last 20 years. In the early 1990s until 2002, weak state structures exacerbated the lack of coordination among various actors involved in the reformation of laws. The preferred approach of preparing laws consisted of the establishment of closed working groups, no more than three to four experts each, working on a particular law. As mentioned earlier, during this time, a legion of legal reform projects in similar areas, sometimes even working on the same legislative measure, but from different perspectives created a plethora of results. No one has dared, or dares, to embark on a study of evaluating the effects and results of those laws.\textsuperscript{17} The myriad of legal reform projects combined with the diversity of experts, bringing their own backgrounds in drafting law, resulted in conflicts in the codification efforts of the late 1990s.\textsuperscript{18}


\textsuperscript{17} There are no studies indicating the implementation or the extent of harmonization of particular pieces of legislation with international standards broadly defined. However, there are reports on the progress of Southeast European countries toward membership or association with the European Union, which contain passages on the status of different sectors related to the internal market, as well as project implementation reports from the World Bank and country reports in the WTO.

\textsuperscript{18} For instance, the Albanian civil code was drafted within the framework of a Council of Europe (CoE) and was adopted relatively quickly by the Parliament in 1994, partly because the elements of the market economy needed some legal basis. At the same time, two other projects from the German Technical Assistance (GTZ), were working on the commercial legislation and
The modern era of legal reform is mostly devoted to the approximation of legislation with the European Union (EU) *acquis*.\(^\text{19}\) The challenge here, since the EU legislation formally does not have direct effect on candidate or associated countries, is to transpose the standards laid down by the EU Treaties, regulations and directives into domestic laws.\(^\text{20}\) The methodology adopted by the Executive branch is to create working groups with experts from interested line ministries that often fall back in the default mode of transposition of their predecessors of the early 1990s.

The proliferation of law, or as I call it “the inflation of legislation,” aimed at filling the gaps between the law in the book and the law in action is in fact only exacerbating the contradictions in the legal system, and simultaneously highlighting the defective nature of the lawmaking process. The implementation of legislation has encountered two barriers that derive their nature from the legislative process. First, there is little understanding in the administration about the EU standards and how to transpose them into the domestic system. This is followed by a poor performance in enforcing laws. The desire for a closer integration with the international, or for greater Europeanization, has provided a powerful incentive to adopt more laws than it is possible to absorb and enforce. Any piece of legislation with a European Union label is fast tracked to the Parliament.\(^\text{21}\) The problem with

\(^{19}\) The body of European Union regulations and standards of primary and secondary legislation, as well as European Court of Justice jurisprudence, case law. By modern era, I mean the results of approximation that started in 2000.

\(^{20}\) The choice of the legal median is left to the enforcing country, and it can either be a law, almost always initiated by the executive branch and voted by the parliament in the so called fast track procedure, or executive orders-by-laws. Within ten years, or sooner, any country associated with the EU, and aspiring for membership, has to incorporate approximately 100,000 pages of *acquis*, the number keeps growing each year.

\(^{21}\) The fast track procedure is widely used in Central and Eastern European parliaments, and as a matter of fact, it is adopted solely for the purpose of adopting laws required under the relationship with the EU.
this is not the existence of just weak administrative capacities, but with the approach taken to the harmonization of legislation. Second, as the institution responsible for enforcing such contradictory and incoherent laws, the judiciary is the ultimate bearer of inadequacies of the legislative process. Among many complaints from judges is their relative ignorance of the laws, and the inability to understand, interpret and enforce legislation. This trend is a result of their absolute absence from the lawmaking process.

The third Chapter puts forward some proposals to ameliorate the lawmaking process by introducing several ways of assessing and evaluating legislation. Almost every report from the international community on Albania emphasizes the failure to enforce laws. This problem is often attributed to inadequate capacities or political will. Instead, it should serve as a cause for inquiring about the coherence of the legal reform programs. The fact that despite 20 years of transition Albania is still in transition facing the same type of problems indicates that questioning the human and institutional capital does not fully address the issue. It is feasible to assume that in 20 years people would have had the time to train and learn, even by a trial and error method.

Concluding, this paper elucidates the complexity of lawmaking in a transitioning process and exposes conflicting aspects of the legal reform, which tend to favor legality over legitimacy. The implication, ultimately, is the perpetuation of transition and the withering away of the legitimacy of democratic regimes.

III. CHAPTER ONE: TWENTY YEARS OF TRANSITION: POLITICS AND ACTORS

In this Chapter, I lay the context to my argument that attempts to reform legislation during periods of transition are inherently unable to reflect the complex and ever shifting social forces that regulate relationships in a society. This inherent inability in turn emphasizes the tension in the relationship between the legality of normative measures and the legitimacy of solutions, which undermines the credibility of law as an instrument of change. I provide a narrative of the transition process in Albania during the 1990s, focusing on two aspects, first, highlighting the chaotic
nature of the process and the erosion of the state associated with the rise of informality, and second, the actors that largely drive the transformation process. The choice of Albania is not simply based on knowledge of the country, but rather one based on the merits of the case. The experience of the legal reform in Albania is in itself a study in complexity. It includes phenomena common to most of the other former socialist countries, and in some aspects it outpaces them in its extremity and severity. It is illustrative of a country that experienced a period of modernization through industrialization and urbanization between 1924-1989. In turn, from 1991 until present day, it is systematically and structurally deindustrialized, with one fourth of the population leaving to go overseas. Furthermore, it is illustrative of a country where democratization after Huntingtonian’s third wave model is being reinjected.22

A. Politics of Transition and Transformation

It becomes therefore necessary to say a few words about the forces and phenomena that shape the context in which we find the seeds of legal reform programs as instruments of change. The transition from a communist country towards a liberal democracy in the early 1990s relied heavily on law. Hart has argued that the need for certainty about rules points to the need for a legal system.23 This central and formal understanding of law was

---

22. In this latter context, the country experienced a brief period of democratization in mid 1920s until 1939. After 1947, with the consolidation of the Communist Party’s grasp of power, the totalitarian ideology permeated every particle of the society, economy and politics, thus treating these three components as one. The transition process taking place since 1991 is structurally transforming the society, economy and politics, treating each one of these components individually. However, I use the term “reinjected” not only to denote the above-mentioned cycle, but also to the fluctuations between democracy and quasi-authoritarianism that characterized the political landscape between 1991-2010. Respectively, 1991-1995 and 2001-2007 were the most democratic periods, whereas 1995-2001 and 2007-2010 were periods where quasi-authoritarianism was on the rise.

considered as the necessary vehicle to achieve society’s goals and inspirations. The centrality and omnipresence of law takes a totalitarian dimension when considering the attempts to refer to law and to formalize almost every aspect of life, or as David Kennedy says “there is law at every turn.”

Even the political rhetoric embraced concepts such as “respect for law,” and “rule of law, often ascribing to it a legitimizing function.” However, few actually understand the meaning of rule of law or agree on its implications. Indeed, the formalization of law, or for better words, the drive towards formalism, is pervasive and utterly imported.

Within each society law is embedded differently in the social texture, varying in its form, substance, social functions, regulative impact and in its legislative procedures. While the content and consequences of a law could be judged separately from the process by which it is made, I argue that the process itself has an influence on the attitudes and on the acceptance of law. Needless to say, an open law-making process enables the law to positively deal with major social issues, inform the interested communities about the envisioned goals, objectives and procedures, and adjust the role of the implementing institutions.

In a totalitarian state, law has a subservient position to the party guidelines. It thus takes an instrumental role in the Party’s interests. For instance, in Albania the functioning of the secret police was not regulated by a legal framework, and its absence did not prevent the secret police from enforcing laws, or the “party’s line.” On the other hand, there was an extreme attempt at legalizing, or formalizing, other aspects of life. As the communist system matured, so it formalized the relationship of the individual to the state, extending to the utmost details of life in the gulags. The more the socialist state matured, the more laws it adopted. The


25. It is worth mentioning that there is no translation of the “rule of law” into the Albanian language. The substituted version, which supposedly means rule of law in the local context is indeed “shtet ligjor,” “Rechtsstaat,” “a legal state.”


27. The slogan was, “What the people say the party does, and what the party say, people do.”
establishment of “the rule of law society,” or Rechtsstaat, is portrayed to correspond with the victory of rules against informalism. However, the exact definition of the rule of law in countries in transition is ambiguous. It constantly shifts according to the exclusive function of what an organization needs to do to justify legal reforms projects. In assessing the rule of law programs sponsored by the World Bank, Alvaro Santos tracks the variations of the concept of rule of law in legal reform programs according to institutional and substantive, instrumental and intrinsic criteria of classification.²⁸

The abrupt decentralization of governmental powers, along with the reduction in competencies and size of the central and local governments, resulting from neoliberal prescriptions on the role of government as a watchdog, contributed to a gap between law in the books and law in action. What followed after the collapse of the ancien régime was a move from a highly centralized state towards a mutation of the government’s role in the society following the laissez faire doctrine.²⁹ Law became the epicenter and the rule of law rhetoric became the slogan of the day. Regardless of the size of government, and in the early 1990s the size of the public sector decreased steadily, the number of laws increased on a daily basis. This process transformed law into a product. Today, for instance, the number of laws produced by any Ministry is the measure of effectiveness for that institution, a measure of productivity and efficacy, a symbol of its success. It determines the fate of one’s career and furthermore, it determines the understanding of law and its relation to the society. Experts and institutions are seen as factors of production; law is therefore commodified.

The economic component of transition is outliving its contemporaries elsewhere. It has achieved the goal of fundamentally restructuring the economy by utterly deindustrializing it. This form of restructuring has allowed only for

²⁹ The approach of shock therapies can be conceptualized as a fluctuation between “seizing the window of opportunity” and therefore relying on discretion and standards to achieve the ends of a liberal democratic society with a functioning market economy, and the return to institutions, understood as rules of the games, as a precondition for the functioning of the market.
the emergence of trafficking of human beings and drugs, as well as the remittance of migrant workers. It has systematically encouraged immigration by effectively turning it into the single biggest input of the GDP, and it has eroded any trust in the legitimacy of the system.

The lack of trust in the legal system results in a surge towards the informal, which being more efficient, contributes to the decline of the trust in the system.\textsuperscript{30} In the context of customary law, or informal normative aspects of the society and formal rules, Sigismund Diamond writes that “[c]ustom is the modality of primitive society; law is the instrument of civilization, of political society sanctioned by organized force, presumably above society at large, and buttressing a new set of social interests,” or as Sir Henry Maine has famously conceptualized the development of law and society as moving from status to contract.\textsuperscript{31}

“Social norms are relevant to legal failure,” writes Galligan, in the first place they tend to undermine the function of law as a distinct means of social regulations.\textsuperscript{32} They do so by undermining or diminishing the special qualities law needs in order to be effective.\textsuperscript{33} If law is not seen as important in serving social needs, the conditions for its being able to develop in order to do so are likely to be missing. Another way social norms are relevant to legal failure is when their content conflicts with the law. In the case of Albania, social norms associated with the ancien régime quickly became taboo, and instead the society turned towards the formal and informal law for guidance. What took place can be described as a competition of forces in the vacuum resulting from a

\textsuperscript{30} A perfect example of the informalism in the economy and the silence of the legal system is the phenomenon regarding the financial “pyramid” schemes of 1995-'97. Promoted by every single international organization with a presence in the country as a success story among Central and Eastern European countries, “a poster child,” the Albanian government encouraged the system of informal money lending. The epilogue of this two year-old process consisted of the presence of a stabilization police mission of the European Community in Albania in order to restore public order after the collapse of the “pyramids.”

\textsuperscript{31} Sigismund Diamond, \textit{The Rule of Law versus the Order of Custom}, 38 \textit{Soc. Res.} 42 (1971); \textit{SIR HENRY MAINE, ANCIENT LAW} (1861).

\textsuperscript{32} Denis J. Galligan, \textit{Legal Failure in Post-Communist Europe, in Law and Informal Practices, the Post Communist Experience} 1, 4 (Denis J. Galligan & Marina Kurkchiyan eds., 2003).

\textsuperscript{33} \textit{Id.}
lack of social norms to operate in a free society on the one hand, and the lack of the enforcement of laws on the other.

During the last twenty years, there is a parallel development of social norms and legal formalism. The former is a product of peripheries: people cut off from the chores of running a state. The latter is a newborn, a transplant, a product of the center, the nation’s capital, where the domestic cooperates successfully with the international. The surge of formalism as the way of understanding law came from the center, from adopting policies related to the necessities of the market, that is to say the demand for clear, precise, and systemic laws that are supposed to guarantee the functioning of the market and to attract foreign investments.

The change in the understanding of development results in the change of rhetoric on the meaning of rule of law. Whereas Washington consensus policies ascribed an instrumental function to the law in eradicating the past and providing for the future, relying both on formal and informal norms, the new development strategy of the mid to late 1990s based on good governance, foregrounds the law.\textsuperscript{34} This latter approach treats law not only as an instrument of change, but as the goal of transformation, heavily vested with formal characteristics.

A similarity between these two strategies is in the technical nature of the legal reform. The first focuses on questions of efficiency, whereas the second on questions of good governance, rather than on questions of distribution or government. The elimination of the political and therefore of the role of ideology in the functioning of the market and good governance, is done in the name of expertise and technicality that sees win-win situations. However, it is a hard sell to maintain that law is merely technical in nature, and there is no reason to assume that they will be effective on their own.\textsuperscript{35} Reforming legislation is ultimately a


\textsuperscript{35} In an article on the role of law in political transformation, Ruti Teitel argues that the previous politicized nature of law and adjudication partially justifies non-adherence during the transition. This understanding of the rule of law as anti-politics is a common theme. Ruti Teitel, \textit{Transitional Jurisprudence: The Role of Law in Political Transformation}, 106 \textit{Yale L. J.} 7, 2009, 2030 (1997).
political objective that needs a political coalition in place to support it, and public acceptance to enforce it.

The two paradigms of development transcend political divisions. In three consequent periods 1992-1997, 1998-2005, and 2005-2009, governments from both ends of the political spectrum have adopted the above-mentioned strategies. During the first period informality went to the extreme.\(^{36}\) Informal economy, and informal relations in the public administration. The late governments of 1997-2009, under the new paradigm of governance as development have taken steps at formalizing the economy and public administration. However, it does not mean those efforts have made any impact on the relationship of the individual as a political animal to the government and power. While in the socialist regimes it was accepted that the will of the individual was subsumed to the will of the collective, the new democratic regime has yet to provide the emancipation of the individual for which the socialist regime was changed.\(^{37}\) In the new system, the individual has become unhinged and there is a total sense of alienation from the society and a strong move towards familial amoralism.

This narrative on the complexities of transition from a communist legal regime towards a liberal democratic legal order highlights the dilemmas and challenges that a government faces when at the same time it attempts to behave both pragmatically and visionary, legally and politically, in order to control the chaos and direct the transformation.

The fluidity of the relationship between law and politics, or legality and legitimacy, is well illustrated by the phenomenon of political round tables. Whenever there is a political crisis, regardless of the nature and motives, usually the party in power would posit itself as the defender of the legality of some normative act, or institution, such as preferably the Constitution or the courts. The challenger, in its attempts to shake the legitimacy of the system, would demand a solution outside the regular institutional

\(^{36}\) The 1997 financial crisis was attributed to the collapse of the “pyramid schemes.”

\(^{37}\) On the political transformation and the role of values see generally Teitel, supra note 35, at 2026 (Teitel holds that no one rule of law value is essential in the movement toward construction of a more liberal political system).
channels. In a situation like this, the role of the international community is virtually or realistically emphasized by both parties. Never allowing a good crisis to be wasted, the international actors would strive to find followers in need of patronage. This latter game is carefully played out, without giving direct messages, but rather subtly hinting and confounding the local actors with ambiguous messages. The Organization for Security and Cooperation in Europe, OSCE, has become the default player, accumulating legitimacy for itself and also giving legitimacy to its solutions. On the one hand, international actors are involved head over heels in promoting an institutional and formal legal culture, the rule of law society, and on the other hand, the adventurism and quest for solutions outside the institutional framework is rewarded as an adequate response to the difficult nature of transition.

The relevant point here is not about the fact that the Albanian parties disregard the requirements of the rule of law, after all the political rhetoric emphasizes that they are not fully matured democratic actors. Instead, it is the blessing of the international community for orchestrating solutions outside the box. In these situations, the line between political solutions and respect for the rule of law is extremely thin, reflecting an ever present dichotomy of “engagement with local leaders, in other words the informal, and the promotion of respect for the rule of law.”

The axiom that law should be recognized as having an important part in social organization is questioned by the primary actors who adopt it. Savigny’s writes that “[l]aw is only law where it maintains a close relationship with the common consciousness of the people,” the key element in the creation of public confidence in the legal system is the belief that rules agreed to in a democratic manner are followed by the entire society and by state structures.

The rise in the authority of international factors, throughout twenty years of transition, as the ultimate arbiter and source of legitimacy in determining constitutional solutions outside the

---

38. There are several explanations for the failure of law, ranging from weak democratic principles to old mentality from the socialist past.
39. This latter point is illustrated by the engagement of international actors with locals in the political crisis of 1997.
40. FRIEDERICH VON SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW (Madras: J. Higginbotham 1867).
institutional framework, as well as in the top-down approach to disregarding legal formulas, has created the belief of politics \textit{über alles}. It is not clear how this situation fits with the description and final analyses of legal reform projects and workshops that train politicians to think in legal terms. It is not altogether uncommon for the same actors to be encouraged to find solutions outside the system, and the next day to participate in training on the absolute authority of institutions and the rule of law. This latter concept is seriously pursued in transforming the local culture by sowing the concept of law as incubated from the everyday, able to function within the limits that insulate judges and decision makers from outside influences.

The discussion of political culture extends more specifically into the question of access to the legislative process. Whenever people are not effectively consulted in the development of law, and have little reason to view institutions as legitimate, they do not own the law. Consequently, they perceive little obligation to obey it, their decisions on compliance resting on an assessment of the coercive power of the state.\footnote{Neil MacFarlane, \textit{Politics and the Rule of Law in the CIS}, in \textit{Law and Informal Practices, the Post Communist Experience} 61, 74 (Denis J. Galligan & Marina Kurkchiyan eds., 2003).} In this case the only way to succeed in making laws work is to enforce them with impunity.\footnote{This leads to an interesting comparison of the intensity of enforcement of laws and deeply rooted social norms. The Northern part of Albania functioned under the norms of the Kanun of Leka, a 500 year-old formalized customary law, that even existed during the Ottoman occupation, and regulated most aspects of family, civil and penal law. The communist government enforced with an unprecedented impunity its laws, and especially in the Northern part, and with great success. However, as soon as communism fell, the norms of the Kanun resurfaced almost immediately.}

The characteristics of the modern state emphasize the rationality of law and the need for adopting legislative procedures—in particular to contend with inflationary tendencies in legislative production—so as to guarantee the quality of legislation and implement its results. The application of law sometimes takes tyrannical features, reflecting a Weberian sense of the drive towards bureaucratizing any aspect of life in an organized society.\footnote{MAX WEBER'S \textit{ECONOMY AND SOCIETY} (Charles Camic et al. eds., Stanford University Press 2005).} The indispensability of acting according to the legal
process is attributed to the strengthening of the rule of law vis-à-vis ordinary people, and disregarding its relation to the political class. In this context, law can demand absolute fanaticism to the formality of say issuance of birth certificates, where it can be scrupulously implemented. From the perspective of a political party, a formal approach to law can threaten the fragile democratic nature of the state, and thus any attempts at reinforcing legality are swiftly denounced as authoritarian actions by the state.

In authoritarian regimes the legislative process by definition is hermetic. Whereas, the systemic changes of the 1990s attempted to constitute a clean break regarding the substance of legislation, we cannot say the same for the lawmaking process. This is not to say that I am overlooking the significance of the content of new rules creating new rights and obligations. After all Hart said that “...some of the distinctive features of a legal system lie in the provisions it makes...,” however my interests in the procedure are closely connected to the outcome. In this context there is a relationship between the domestic and international factors that dominate the process.

B. Actors of the Lawmaking Process

In this section, I narrate briefly a panorama of the main actors and their activities involved in legal reform in Albania. I map some the most influential actors, without necessarily attempting to comprehensively and exhaustively covering who’s who or who’s doing what. In this context, I provide a typology of some of the most influential actors involved in lawmaking. There are two broad categories that could be used to characterize the actors involved in lawmaking. That is to say I group them according to their origin. In this sense, there are international and domestic actors. Each has its own sub-division between state and non-state actors.

The international actors involved in legal reform programs in Albania can be divided in two groups. The first consists of international organizations, most notably, the European Union

---

44. Hart, supra note 23.
45. Influence in this context is related to the perceived power that is exercised by the said actors.
TRANSITION WITHOUT TRANSFORMATION

(EU), Council of Europe (CoE), and World Bank (WB). The second group consists of donor countries acting through their own governmental and non-governmental organizations, most notably the German Technical Assistance (GTZ), United States Agency for International Development (USAID), and Central and Eastern European Legal Initiative (CEELI). All of these groups work with the local government and non-state actors in conceptualizing and implementing legal reform programs.

The European Community established contractual relations with Albania in 1992 with a Trade and Co-operation Agreement that promoted trade on the basis of non-discrimination and reciprocity. This agreement did contain a provision on the approximation of legislation in the areas of the internal market, but it lacked an institutional approach for large-scale legal reform. However, the “great leap forward” in the EU-Albania relations took place with the launch of the Stabilization and Association Process (SAP) for the Western Balkans in 1999. It was aimed at assisting the Southeast European countries to undergo a political and economic transition that prepared them for a new form of contractual relationship with the EU known as stabilization and association agreements. The Stabilization and Association Agreements (SAA) combine political and economic conditions, such as respect for democratic principles, reform of the judiciary, and strengthening links of the countries of the region with the EC single market. They foresee the establishment of a free trade area with the EC and set out rights and obligations in areas such as competition and state aid rules, intellectual property and establishment, which are supposed to allow the economies of the region to integrate with that of the EU. The Stabilization and Association Agreements contain provisions for the approximation of domestic legislation with the EU acquis in two stages during a 10 year period.

46. As a framework, SAP combined various instruments, an assistance program (CARDS), technical advice, trade preferences, co-operation in fields such as justice and home affairs, and political dialogue.

Each year, a national plan for the approximation with the *acquis* specifies the legal areas and measures that are to be harmonized with the EU standards.\(^48\) It is the largest and most influential package of reformatory instruments adopted each year as part of the EU conditionality for candidate for membership countries. The first areas that are targeted include competition law, intellectual property law, standards and certification law, public procurement law and data protection law. Legal approximation in other sectors of the internal market is an obligation to be met at the end of the transition period. During the second stage of the transitional period the approximation of laws will extend to the elements of the *acquis* that are not covered in the first stage.\(^49\)

During the negotiation period, a Consultative Task Force (CTF) of the European Commission and Albanian government examines the progress of legislation. Every six weeks the Executive is obliged to submit a progress report to the Commission on the status of legislative and institutional measures identified during the CTF, negotiations and in the European Partnership document. In addition to this, the launch of the TAIEX assistance for the approximation of legislation, monitors changes in legislation on a monthly basis.\(^50\)

The Council of Europe is an example of an intergovernmental organization where the Member States, at least conceptually, have greater influence in determining the influence of CoE in their own domestic legal reform projects. However, this is not the case with the former socialist countries. Legal reform programs have been on

---

\(^{48}\) Otherwise referred to as simply NPAA, containing annual legislative and institutional measures to be adopted with a year in order to implement Community legislation and raising administrative capacities to enforce them.

\(^{49}\) Excerpts from the draft European Community and Member States Stabilization and Association Agreement with Albania (unpublished material) (2004).

\(^{50}\) TAIEX is the Technical Assistance and Information Exchange Instrument of the Institution Building unit of Directorate-General Enlargement of the European Commission. Its aim is to provide to the New Member States, acceding countries, candidate countries, and the administrations of the Western Balkans, short-term technical assistance, in line with the overall policy objectives of the European Commission, and in the field of approximation, application and enforcement of EU legislation. Assistance is also provided to those countries included in the EU's European Neighborhood Policy, as well as Russia.
the agenda of the Council of Europe since the beginning of the ‘90s. Its assistance has focused on drafting legislation in civil and criminal areas, consistent with CoE conventions and treaties. In particular, legal instruments such as the civil code, the Constitution, an anti-corruption package, and special legislation in the criminal area have all been prepared with CoE expertise. It has been a working practice and understanding between Albania and CoE, that the Ministry of Justice, or the Constitutional Court would submit major draft laws to CoE’s Legal Affairs Department for opinion and expertise, or ask for opinio juris. In this context, there was a silent agreement between CoE and the Executive branch that in their relations with the Parliament, or the public, a draft law would be considered prepared with CoE expertise as long as it was submitted to it, without CoE necessarily issuing an opinion. Labeling a particular law with CoE brand strengthens the legitimacy of actors and silences political conflicts.

The World Bank has been involved in four different ways in legal reform programs. It has traditionally characterized governance as neutral and technical in character, thus paving the way for reforming the legal systems of host countries. The Bank has contributed to the development of legislation in the areas of

51. The CoE has focused on the process of lawmaking as well. One of its projects was to support member states’ administrations in their efforts to improve the quality of law making. The project’s activities aimed at promoting application of a uniform law-drafting technique and style and identity and disseminate best practice concerning the management of the preparation, discussion, adoption and publication of legislation. Its major themes included transparency of the legislative process where the project’s activities promote more active consultation of external interested organizations and civil society representatives on draft laws and regulations. Broad consultation was also one of the principal tools to enable evaluation of the impact of legislation, which is another important activity of the project aiming at improving the stability of legislation. The project dealt with issues concerning better access to legislation, including the functioning of the official gazettes and design of electronic legal databases.


53. Usually these are draft laws dealing explicitly with political ends. This practice is of importance to the executive but also to other political forces because it can rubber stamp approval or disagreement to their initiatives thus eliminating most of the contested domestic debate.

public procurement, property registration and property law, bankruptcy, collateral laws and laws on the structure of the judiciary. Its Legal and Judicial Reform Project of 2000 reflected a new development paradigm that treats good governance and rule of law as a development strategy. Despite millions of dollars spent mostly on foreign expertise, the results of World Bank’s engagement in legal reform have been disappointing. One of the components, the improvement of the legal education at the Law School of the University of Tirana has not given any particular results.\(^5\) The legal education in the country is by all domestic and international comparisons anemic, to say the least. A project to rehabilitate the school actually left the school in shambles. In an act of triumph of hope versus the experience, the Bank spent considerable funds in futile attempts to build an arbitration center in Tirana, a country where it is fairly easy to bribe any judge, despite numerous ethical and criminal provisions prohibiting it. To this day, after at least six years of existence, the center has still to be used.\(^6\) The transition process fuels distrust in government and authorities. In this case, how the World Bank tried to bridge the distance remains a puzzle. In this context, what is there to prevent anyone from corrupting any arbitrator, when there are no regulations against the conflict of interests or subjecting arbitrators to the jurisdiction of the penal code? Fast tracking the adoption of ethical codes for arbitrators won’t solve the deeply entrenched lack of trust towards any institutions. Furthermore, a stakeholder approach adopted by the World Bank to encourage local authorities to participate in formulating and implementing its recommendations did not make any difference in the process of

\(^{55}\) This particular component aimed at funding twinning arrangements to train faculty staff abroad and technical assistance; strengthening the institutional capacity of the Law School and funding textbook preparation and teaching materials, financing investments, and rehabilitating and expanding the premises of the law faculty building.

adopting national strategies.\textsuperscript{57} The process is as hermetic as it ever was.\textsuperscript{58}

The second group that has contributed considerably to legal reform programs consists mainly of government sponsored organizations, such as the GTZ,\textsuperscript{59} USAID,\textsuperscript{60} and CEELI.\textsuperscript{61} The context for their involvement is the international aid allocated by donor countries, and channeled through them either in the form of direct grants, but mainly in the form of technical assistance. Benefiting from their own expertise and financial resources at hand, they become influential sources of power and legitimation for the host government and local actors. As it will be discussed later in the paper, reliance on dogmatic premises, such as the USAID’s paradigm of creating legal systems that better support democratic practices, or twin competition and rivalries among

\begin{itemize}
\item \textsuperscript{57} See World Bank Projects and Programs, \url{http://www.worldbank.org.al} (last visited April 21, 2011). The Strategy went by the name of National Strategy for Economic and Social Development.
\item \textsuperscript{58} I was in charge of conceptualizing legislative policies at the Ministry of Justice and despite my position, neither my colleagues nor I was ever involved in the World Bank legal reform projects.
\item \textsuperscript{59} GTZ in Albania, \url{http://www.gtz.de/en/weltweit/europa-kaukasus-zentralasien/648.htm} (last visited April 21, 2011). The bilateral cooperation between GTZ and Albania began in 1988, even before the Communist era had ended, and it focused mainly on the economic sector. In this framework the legal expertise of the GTZ has been influential to the development of the Albanian commercial legislation and registry of companies, civil procedure, insolvency law, and recently of the competition and consumer protection laws.
\item \textsuperscript{60} USAID in Albania, Rule of Law, \url{http://albania.usaid.gov} (last visited April 21, 2011). Its programs aimed at improving the professional and ethical performance of the judiciary and judicial institutions, promoting anti-corruption and avoidance of conflicts of interests, land titles, mobilizing citizens to demand accountability and transparency from the government, promoting public awareness and education, domestic violence and the new family code.
\item \textsuperscript{61} CEELI activities in Albania, \url{http://apps.americanbar.org/rol/europe_and_eurasia/albania.html} (last visited April 21, 2011). The Central and Eastern European Legal Initiative (CEELI) was active in Albania right after the collapse of the regime in 1992. It supported Eastern European countries and not it is focusing on Central Asia. Since commencing its program CEELI’s major projects have included: substantial assistance in support of the drafting of a new, democratic constitution, adopted through a popular referendum in 1998; promotion of judicial independence by supporting the creation of the Albanian Magistrates School and facilitating the establishment of the National Judicial Conference; and substantial support of legal profession reform and legal education by providing expertise and assistance to the National Chamber of Advocates. From 1998 to 2001, CEELI conducted a Criminal Law Reform Program, and from 2002 it worked in the anti-corruption campaign.
\end{itemize}
organizations can serve as illuminating lessons for modern day lawmaking and democratization.\textsuperscript{62}

The domestic actors can be divided in governmental actors, in particular the Parliament and Ministries, and a potpourri of sub national non-state actors. The latter are often created and maintained through family ties to the government, or through alliances. Based on that connection, a rotation of fortunes for these organizations takes place whenever the right or the left come to power. Formally, Article 81§1 of the Constitution gives the right to initiate laws to the Council of Ministers, members of parliament, and 20,000 voters.\textsuperscript{63} An interesting shift in legislative powers can be traced to the rise of the Executive branch as the predominant actor in lawmaking. Approximately 99\% of all legislation approved by the Parliament is initiated by the Council of Ministers.\textsuperscript{64} Article 26 of the law “On the Organization and Functioning of the Council of Ministers” recognizes the right of legislative initiatives only for ministries and their dependent agencies. Every ministry proposes legal acts in accordance with the area of competencies and with the activities of the dependent agencies and central institutions. Among the ministries, the most influential is the Ministry of Justice, which not only has the right to initiate laws, but most importantly is the gatekeeper for the compatibility of laws.

The Ministry of Justice, reestablished in 1990 after three decades of inexistence in the socialist regime, where the presumption was that the state and the party were always right hence there was no need for public defenders, practicing lawyers and a Ministry of Justice, is the principal state institution responsible for the implementation of general government policy.

\textsuperscript{62} As it will be discussed later in the paper, the rivalry was between two German organizations, GTZ and IRZ. Since 2000, the GTZ and IRZ, two leading German organizations shifted their focus toward providing the impetus for domestic reform and regional cooperation for a closer rapprochement with the European Union. The common areas of work and competence lead to a serious rivalry among these two organizations for funds which both of them received from the funds allocated by the German Ministry of Foreign Affairs to Albania.

\textsuperscript{63} The Albanian Constitution is one of the latest constitutions of Eastern Europe, adopted by a referendum on 28 November 1998.

\textsuperscript{64} This is an estimated number from my own experience at the General Department of Codification in the Ministry of Justice.
in the field of justice and is generally responsible for justice and legislative reform. Through its Directorate of Codification it has a central role in the preparation of government’s legislative policies and legislation, and most importantly in checking the compatibility of draft laws and other normative acts.

The problem with the legislative actors is twofold. As part of the regulatory scheme, the Constitution empowers the MPs with the right to initiate legislation. However, as the statistics show, this right is used in very rare occasions. It looks like the transformation of the society through law is a task serious enough not to be trusted exclusively to the parliamentarians. Downgrading the role of Parliament from the legislator into the approver, or rubber stamp, directly and gravely influences the parliamentarian basis of the state. On the other hand, there is a modus operandi among the international organizations, governmental sponsored organizations and the local government and organizations that foster a culture of self-perpetuation and legitimization for the conceptualization and implementation of legal reform projects. These legislative practices effectively restrict access to lawmaking, and there are no incentives on the part of the main actors to change the status quo.

The relationship between democratic decision-making and rule of law principles is a two way street. Just as democracy rests in considerable measure on the rule of law, the latter rests in turn on democratic institutions and processes. Hence a balanced relationship between the rule of law and a democratic legislative process is needed to ease the transformation of the regimes. The legislative process in Albania during 20 years of transition displays chaotic characteristics, giving few opportunities to the public to get it involved in the lawmaking process. In this context the notion of

65. Law No. 8678, dated 14/05/2001 “On the organization and Functioning of the Ministry of Justice.”
66. Id.
67. Approximately 99% of the laws are initiated outside the parliament, with the latter always voting in favor of tabled laws. Data from the Albanian Parliament, www.parlament.al (last visited April 21, 2011).
68. Albania is a Parliamentary Republic, according to Art. 1 of the Constitution.
law as an instrument of reform reflects a top-down approach. Despite some merits to this approach, the need for bottom-up considerations takes a more accentuated role in democratic societies and is a legitimate one in the prism of participatory democracy.\textsuperscript{70} Direct participation could increase access to the political system and greater voters’ involvement in the legislative process, thus giving more legitimacy to the system.

IV. CHAPTER TWO: THE TRAFFIC OF LEGAL NORMS

Legal reform does not take place in a vacuum. The need to fill gaps in a short time, combined with international pressure to stimulate the need creates an environment that is forced to receive norms and institutions. This process resembles a sophisticated system of offer and demand for legal norms.\textsuperscript{71} Expertise and financial rewards are key mechanisms to the functioning of the system. The feasibility of projects relies mostly on the origin of the organization(s) involved. The more Western an organization is, the higher the chances for funding and trading in influence. Prestige carries a lot of weight.

In this chapter, I attempt to elucidate the dark sides of legal engineering. In particular, I draw attention to the practices of legal experts and the form of expertise involved in lawmaking in Albania and Nepal, where I have had the opportunity to witness first hand how laws are made. I also draw upon some theoretical frameworks of comparative law to help me navigate and streamline the information that I gathered while working on legal reform programs. A particular discussion is dedicated to the workings of the legislative process, which is contrasted with the Constitution making process. While I make the argument for more inclusive participatory politics in lawmaking, I also caution against the

\textsuperscript{70} It is obvious that the adoption of Napoleon’s Civil Code was of benefit not only for the French society but also it had a strong resonance in other European countries as well, which as a result of the spill over effect incorporated that code into their domestic legal systems. On the other hand, the paradoxes that associated the communist legal reform regarding collectivization and the crimes against state are an example of seeing the law as a mere instrument of government.

\textsuperscript{71} Ajani, supra note 7, at 97.
formality of the process as substituting the political will of the parties.

If law is made to be a means to an end rather than *vice versa*, then it follows that it should take into account the moral and social norms of a particular society. According to Merryman, legal reform either tinkers with the legal system, follows or leads the social change. Two immediate problems are associated with legal reform projects. The first is the evident mismatch of the supply and demand of legal norms. The premise of this problem is the assumption that formalism demands the production of laws. In this context, pragmatic or dogmatic perspectives on the nature of transformation stimulate the demand for laws. The second problem refers to the nature of transplants. The multitude of actors and methodologies for transplanting laws has created a situation where it is impossible to trace the origin of laws. In this case, transplants take on a life of their own, losing their original meaning and intent. Frankenberg calls this process of supply and demand of expertise and laws as “[j]uridic midwives of capitalism . . . monitored by representatives of supra-or international organizations they dismantle and overhaul the old normative

---

72. *But see* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 97, 109 (1993) (“It follows from the four reflections to this point that usually legal rules are not peculiarly devised for the particular society in which they now operate and also that this is not a matter for great concern.” “. . . The fact is, I believe, that even in theory there is no simple correlation between a society and its law.”).


74. Jonathan Miller provides a typology of transplants classifying them as cost-saving transplants, externally dictated transplants, legitimacy generating transplants, and entrepreneurial transplants. All these types are found interchangeably in legal reform projects. Usually the entrepreneurial and legitimacy generating transplants are the most used, although the cost-saving is often used when there are no administrative capacities able to provide an analysis of a particular transplant, save the case of a legitimacy generating transplant. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 4, 839 (2003).

superstructure, importing, adapting, and transplanting legal codes.\footnote{76}{Frankenberg, supra note 13.}

A. The Supply and Demand of Transplants: Diversity of Origins—Diversity of Results

In one of my early days at the Ministry of Justice in Albania, I found a folder containing the *traveaux préparatoire* of the Election Code. Curiosity took the better of me and I started going through it. The working group was established under the auspices of the OSCE, which was very active in 2000 in establishing the rule of law in the country. Several of its experts were involved in drafting the Code, which was supposed to cure once and for all whatever was wrong with Albanian elections. I could not believe the surprise and sheer amazement I felt when I found in the folder the Election Code of former Zaire. One needs to be especially skilled in legal engineering to extract and adapt Mobutu’s Zaire electoral rules in order to democratize Albania of 2001. However strange this may be, it was a part of a larger pattern. The reformatory process in Albania was characterized by a diversity of approaches and methods in drafting laws. The result consisted of an amalgam of laws, broadly taken by the common law tradition and Germanic-Roman law.\footnote{77}{For instance, the Civil Code was drafted after the French Code Civil in the framework of a Council of Europe project, while simultaneously, GTZ experts drafted the first part of the commercial legislation with the registry of companies modeled after the French and German legislation. The registration of private property recently was developed under the auspices of the USAID, whereas the criminal and criminal procedure code were aligned with the Italian legislation.} Of course, the first draft of the Election code in 2000 had the exotic nuances of Zaire.

A diametrically different experience was in the case of Nepal. At the Center of Micro-Finance where I was helping with drafting the legal framework on microfinance, a more inclusive, participatory process was in place. Most of the relevant stakeholders were part of a process in which they learnt of our efforts and at the same time they contributed valuable comments and suggestions. The draft law was drawn from the experience of Nepal and from other neighboring countries. This is not to say that
the final draft was a combination of transplants, at contrary, the law was entirely home grown on the premise that it benefited from lessons learned either in Nepal, or in neighboring countries. Having in mind the reformatory aspect of the law, the legal framework also reflected international standards of accountability and good governance. In this way, it was more productive to engage with a local product that aimed at achieving higher standards for governance.

There are two direct consequences resulting from the diversity of the methodologies and projects of the legal reform. First, there is a sense of confusion or alienation that is derived from the chaotic nature of the legal system and its incoherence. Second, a sense that the lack of action on the part of government or private actors is attributed to the vacuum in legislation. This implies an urge to adopt more laws in order to bring the country up to date with modern standards. As it was mentioned in the first Chapter, generating laws is the measurement of success and efficacy of public institutions. It is an imposed solution in a closed administration and civic society catering to the needs of project awardees. This creates a vicious circle, which perpetuates a need to adopt new laws every day. In turn, they are practically never absorbed by the administration itself, by the elite, or by the public. As an example, shortly after I started working in Albania, during one of the negotiations in the framework of accession to NATO, the Ministry of Foreign Affairs had no data regarding the UN conventions ratified by Albania. The large number of adopted laws and by laws also makes the lawmaking process difficult to manage. It is obvious to say that the process needs management in order to ensure effectiveness in adoption and in implementation.

Pressure from the interaction with international organizations and donor countries is being brought to bear on the Executive branch as well as the Parliament. The membership in

78. A direct result, which is connected with the large number of normative acts adopted by the Government is the lack of disseminating information in the communities of lawyers and judges. A shared complaint by the members of the judiciary is the frequent amendment to laws, and the lack of codification.

79. See Robert C. Bergeron, Globalization of the Dialogue on the Legislative Process, 23 STATUTE L. REV. 85 (2002). Examples include the need to incorporate structural changes and “rule of law” reforms into domestic law as
international organizations, such as the WTO for instance, requires constant assessment of the existing legislation against the international norms. An element worth mentioning here is that while there is a vigorous debate in EU circles about the relationship of WTO norms not only on states individually, but also on the EU and its institutions. In Albania, the relationship of domestic law to international law takes a very formalistic, and dogmatic perspective. There is little room for discussion among judges and other practitioners on whether international law supercedes national law in whatever form, period. The WTO and the related treaties, such as WIPO, were ratified in a single session in Parliament. The prospective membership in the EU brings with it a requirement for a comprehensive rehaul of legislation in order to bring it up to EU standards. It also requires the examination of the entire legislative process to ensure that future laws meet the required standards. In this latter context, beginner’s luck was to accompany me during the first year at the Ministry of Justice. In one of the office visits by legal experts, I was abruptly introduced to the world of legal reform projects. Under the goal of modernizing the legislation, an expert introduced me to the inefficiencies of the Albanian insolvencies law which was drafted by his organization some years ago (GTZ). He eloquently argued that I should inform the Minister about the immediate need to amend the legislation in order to align it with the acquis. His organization was only too happy to assist us.

Newton says: “[t]he very term ‘transplantation,’ biased towards the technical, masks the political realities, for ‘legal transplantation’ is always necessarily a species of the genus legislation. To speak, as comparativists typically do, of transplantation as ‘reception’ is to obscure the political calculations and complex play of interests behind any modern instance of importing statutes (or concepts or provisions).” Watson on the

---

80. See generally Armin von Bogdandy, European Integration and International Coordination (2002).
81. Newton, supra note 12, at 152.
other hand makes the case that transplantation has occurred all the time and the modern legal systems are the fruits of massive trans plantations. Limited in the technicality of the term, the reform in changing and aligning legislation with the international standards and with the EU *acquis* becomes easier to be conceptualized and adopted. This approach however misses the point of how are the transplants incorporated and how are implemented.

The multitude of national strategies and action plans addressing particular recommendations can be evaluated twofold. Firstly, there is a lack of coherence among the goals and objectives of legal reform programs proposed by the interested actors, which results not only in sporadic implementation, but resonates problems in codification, and creates the need for repetitious revisions in all areas of legislation. Secondly, there is a lack of cohesiveness within a single legal reform project, manifested in terms of maintaining uniformity and cohesion in conceptualizing goals and objectives and drafting legislation.

The process of adoption of the NPAA and APIEP was typical of the Albanian administration. It merits a few words of explanation to illustrate the process and methodology. The drafting process of the APIEP started in early May 2004 with the aim of finalizing it by early June. The methodology adopted to draft the Plan was the result of a “compromise” of two different EU technical assistance experts assigned to the Ministry of

---

83. NPAA, APIEP are instruments regarding the European Union, whereas the National Strategy for Economic and Social Development was adopted as a requirement from the World Bank.
84. See generally *European Partnerships for Western Balkans*, [http://www.europa.eu.int/comm/external_relations/see/docs/index.htm](http://www.europa.eu.int/comm/external_relations/see/docs/index.htm) (last visited April 21, 2011). The approximation of legislation is conceptualized in the National Plan for the Adoption of the *Acquis* (NPAA), as well as in the Action Plan for the Implementation of the European Partnerships (APIEP). These plans contain annual as well as medium term legislative and institutional building measures. The launch of European Partnerships in 2004, in addition to the annual preparation of National Plan for the Adoption of Acquis (NPAA), has put the focus on identifying short and mid-term priorities regarding the preparations for further integration with the European Union identified in the Commission’s 2004 Annual Reports and serves as a checklist against which to measure progress. The NPAA and the APIEP are developed independently by national authorities, subject to revisions and monitoring by the technical joint committees associated country-European Commission.
European Integration, which had conflicting perspectives and proposed different methodologies. The conflicting methodological viewpoint, poor training on the part of ministries’ experts as well as the hermetic process of consultations and drafting prevented the working group from coming up with a final draft, even four months after the formal start of the project. The question is not simply that if there were only one set of experts then the confusion would have been avoided. The problem goes deeper into the incoherency of strategic objectives.

It is significantly easier to adopt legislation that comes from a well-established source. The authority of the legislation provides not only for a broader acceptance in the Parliament but serves as a legitimacy claim by the Executive versus opposition, and towards the population at large. The foreign technical expertise, alignment with the international standards, and the process of Europeanization of the legislation contain sufficient dosages of authority to facilitate the adoption of laws. It should be said that the alignment of the domestic legislation with international standards is not objectionable in itself. On the contrary, the drive of formerly oppressed societies towards universalistic virtues brings much vitality and needed energy. A flaw of this process is the strong emphasis on product over process that dominates the reform. In this context, the gap, or the contradiction, between the objectives and results makes the case of a careful review of the lawmaking process.

The focus over the product is closely connected to the underlying motives that propel actors to become involved in legal reform projects. Furthermore, the legal reform projects overlap not only with regard to their substance, but also with regard to the actors. Legal reform projects have become a source of income for

85. One of the projects was intended to support Albania with the approximation of legislation before the negotiations for the Stabilization and Association Agreement were opened, preparing the country for them. Thanks to the Brussels bureaucracy it started some three years later, after the negotiations started. The second one was of course associated with the development of the SAA negotiations as technical support to the administration.

86. The methodologies used for drafting the Plan were revised on a bi-weekly basis, acting on differing proposals from the two projects’ expertise. Needless to say it threw the whole administrative network tasked with preparing the document into a state of constant chaos and incertitude.

many NGOs, founded by former or current ministers, or their wives. The quest for funds bypasses gap analyses on the need for a particular piece of legislation. The hierarchic and economic liaisons of the workplace enable many government experts to offer their expertise in the framework of the projects. In a different spin, the mobility and rotation in power of existing and former high level government civil servants influences the conception and implementation of assistance programs and the division of projects.

The following example illustrates the dynamic of actors’ rivalry. In 2000-2001, two leading German organizations, German Technical Assistance (GTZ) and the German Foundation for International Legal Cooperation entered the market of approximation of Albanian legislation with the EU acquis. Both of them were funded by the German Ministry of Foreign Affairs and were competing for the same assistance for the Department of Approximation of Legislation in the Ministry of Justice. The competitive situation derogated to the point that the intervention of the German Embassy was necessary to basically remove IRZ from the approximation of legislation and encourage it to participate in other activities in the country. The result of the competition among the legal reform providers is not limited to projects working in the same area.

The predominant methodology of drafting laws in Albania consisted largely of transplanting laws or provisions from different experiences. For instance, the working group on drafting the copyright law tried to transplant part of the Italian, Romanian and Greek copyright laws. This approach stands in contrast to the process of approximation of legislation with the acquis. The requirements of the EU alignment consist of the transposition of Treaty provisions, regulations and standards of directives into domestic laws. This form of transposition demands a new...
strategy of drafting laws that differs from a classical transplant based approach. Instead of eyeing similar legislation in different Member States, some working groups, for example in the area of competition and consumer protection, based their work on standards set by relevant directives and regulations. According to this approach, the legislation of Member States has a complimentary role in providing a comparative bases for evaluating different models and in challenging, or affirming the assumptions of a particular law, rather than an in promptu translation and incorporation into the domestic system.

Regardless of sporadic episodes of bringing laws closer to the social context, the political will and the reformatory goals, the trend of legal transplants will continue to influence the lawmaking process. The benefits of comparative law can easily be demonstrated as lessons learned from other jurisdictions. However, it can or should not substitute for drafting laws that reflect the social context, the political will and the reformatory goals. The accession into the European Union is in itself a great exercise in reforming the legislation. The approximation of legislation with 100,000 pages of acquis is a process that requires first of all, and at least, a well-coordinated mechanism in order to prevent frequent amendments of legislation and to ensure wide acceptance for the necessary reforms. Wider participation of the concerned actors and public can influence the zeal with which the proponents of EU advocate swifter lawmaking.

The tendency to adopt and incorporate as many international agreements as possible and EU acquis comes mainly from the lack
of deliberations in the legislative process. In the situation when it is fairly easy to initiate a draft law under the label “European Integration” even the formal requirements of the lawmaking process become a mere formality. One can pass almost anything as long as it is properly labeled. The heavier (read powerful) the authority submitting a draft law, the faster the lawmaking process works. They are in direct proportion. In this way, they reflect the contradiction between the need to adopt legislation using the fast-tracking parliamentary procedures, in order to speed the pace of integration, and the need for a greater public deliberation, in order to ensure the “stakeholders as process owners” perspective.

B. A Comparative Perspective of the Legislative and Constitution Making Process

In this section, I explore the nuances of the lawmaking process in two different contexts. The first is a typical procedure that is used for adopting laws, and it includes both the drafting, and the passing of the laws by the Parliament. A caveat to that is the process of adopting EU acquis, which I explain immediately below. The second context is provided by the process, in which the Constitution was drafted in 1998. As described earlier in the Chapter, the large amount of legislation enacted every year, overlooking the process, contributes to the lack of implementation. A hypothesis could be raised whether normative acts would have a better chance of being implemented if a participatory lawmaking process was in place. In the interest of promoting much discussed democratic standards of transparency and accountability, such an approach could vest the system with more legitimacy.

The tension between a participatory lawmaking process and the product of legal reform projects becomes palpable in the case of adoption of the EU acquis. The usual legislative procedure is more preoccupied with ensuring the legality of the process, rather than establishing the mechanisms for ensuring legitimacy. Prior to the start of the negotiations for the SAA the approach to legal reform varied from one actor to the other. As noted earlier, the different approaches produced a myriad of results. The EU acquis were almost never taken into consideration by any working groups or legal reform projects. The laws were drafted to resemble particular
legislation of different countries, regardless of whether they were EU Member States or not.

In order to convey the commitment to the European integration, the Parliament has introduced a de-facto fast-track parliamentary procedure to pass legislation that aims at approximating domestic laws with the EU acquis or demands. Under this procedure, the Parliament has a limited time to review a particular draft law introduced by the Council of Ministers. The latter has the sole authority to carry out negotiations and maintain relations with the EU. According to the annual legislative plans, a majority of laws come from the EU conditionality for membership. For fairness sake, the EU is not the only international organization that wields power. The OSCE, World Bank, IMF, UN, WTO, and any other donor country have the prerogative to dictate conditions, and a de facto fast-track procedure is established for adopting laws coming from these organizations.

The typical law drafting in Albania starts with the preparation and adoption every January by the Council of Ministers of an annual legislative plan. It is coordinated through the Department of Coordination at the Prime Minister’s Office with the legal departments of the line ministries and the central institutions. According to the law “On the Organization and Functioning of the Council of Ministers,” each ministry sets up working groups to come up with planned legislative measures. Representatives from the Ministry of Justice and the Ministry of European Integration are invited to participate in the working groups charged with drafting normative acts.

After the working group completes the draft, it goes for revision to the interested line ministries and to the Department of Coordination, in order to settle disputes and approve the final version before introducing the draft law for approval in the Council of Ministers. Although formalized, this procedure is not exclusive and there have been numerous occasions when draft laws are introduced outside of this procedure. A sine qua non of the legislative process is the opinion of the Ministry of Justice for all normative acts and of the Ministry of European Integration for those normative acts that affect one of the areas of the acquis.

Pending review and approval by the Council of Ministers, a draft law is submitted to the relevant Parliamentary commissions
with jurisdiction on the subject area of the draft law and always to the Legal Affairs Commissions. Although members of Parliament have the legislative initiative, very few laws are adopted by the MP’s initiative. It could be stated that the Parliament in a Parliamentary Republic has relinquished its legislative role by giving the Executive branch a quasi monopoly on legislation.

Formally, meetings of parliamentary commissions are open and MPs reserve the right to invite experts to discuss proposed laws. The process is intended to be deliberative. Actually, proceedings before parliamentary commissions are routine matters, where there is almost no deliberation. Rarely does anyone read the texts of a proposed legislative acts. Unless a proposed law is of a political nature, all others are adopted, almost always unanimously. After adoption by the relevant commissions, a report is prepared regarding the status of the draft law. In case members of the commissions have reservations regarding the draft law, they are included in the report.

Regarding the incorporation of international agreements into the domestic law, the situation is even simpler. Few would dare to run counter the “will” of integration and the internationalization of the legal system. A draft law incorporating the agreement is sent for opinion to the Ministry of Justice and the Ministry of foreign Affairs. The process of reviewing the international agreements is practically non-existent. The pressure to modernize the laws, and to have friendly relations with all international organizations and donor countries, influences the depth of reviewing the contents of international agreements. The proceedings before the Parliamentary commissions also in this case are quite fast and without much debate.

In this respect, the membership in the WTO was a perfect example of the hermetic nature of the legislative process. Most of the interested communities, the local producers, did not have a chance to participate in the negotiations and the preparatory work for concluding the membership agreement. Six years after the accession to the WTO, most of the business community frequently demands the renegotiation of the membership agreement, and the renegotiation of all free trade agreements with various countries. The seriousness of the matter was taken into consideration by
political parties in their election campaigns of July 2005, promising to renegotiate all the concerned agreements.

From a purely formalist position, it should be noted that there is no law guaranteeing citizens the opportunity to become part of the process of drafting laws, and this affects all ministries. As there is no legal provision that would require the Ministry of Justice to regulate public participation in drafting laws, the Ministry of Justice sees itself under no legal obligation to do so.

Access to law is an essential element of any state governed by the rule of law, and a problematic area that I tried to raise in this paper. However, despite the obvious benefits of an open minded approach to public participation, a right to public participation is not a recipe for success, and it’s worth looking at some of its dark sides and blind spots. Apart from the traditional means of publicizing the law such as “official gazettes,” information technology is now extensively used to enable wide-ranging possibilities for electronic access to legal texts. Public participation should not be taken to mean voting, as for example electing a constitutional convention or ratifying a constitutional text by a referendum. At its best, participatory constitutionalism works and counteracts the arguments in support of elite negotiation as the sole effective model.

The Constitution making process reflects the greater participation that attempted to lend legitimacy to the product. Although, by contrast to the traditional process of lawmaking, the Constitution making process was much more participatory and deliberative, the political boycotting by the opposition party contributed to the anemic nature of the final product. With this caution in mind, it is worth contrasting these two lawmaking processes to highlight the nature of participation and deliberation. It is also necessary to emphasize the important role of mechanisms that are needed to ensure the right to participate and deliberate. During the process of drafting the Albanian Constitution, Frankenberg wrote about the rules that would guide the legislative process: (1) institutions must be simple; (2) functions must be

---

91. It should be said that while the Constitution suffers from a lack of enforcement, due to its problematic substantive elements, and the initial political taint, the process of making it represents an interesting practice worth studying and illustrating.
clearly divided among the institutions; (3) the legislative process must be transparent; (4) the legislative process must be efficient (as guaranteed by public scrutiny); and (5) popular participation must be permitted. 

Despite the practice of a participatory lawmakers process that characterized the Constitution making process, the supreme law of the country does not contain a single provision for the public access in the lawmaking process. The process of drafting the Constitution took into account the need for a wide participatory approach in order to best exploit the resources of local and international NGOs, and reflect the perspectives of the local experts and of the public in a more general tone.

The Administrative Center for the Coordination of Assistance and Public Participation (ACCAPP), a joint initiative of ABA/CEELI, GTZ, and OSCE, served as a liaison between and among Albanian and international participants in the constitutional drafting process. Its function was to ensure that all interested parties had the opportunity to participate fully and to avoid duplicative and conflicting initiatives. As such it was working to create a program of public participation. It solicited assistance from Albanian NGOs and international donors to provide materials, training, and financial assistance to develop strategies for organizing assistance and promoting public participation in the constitutional drafting process.

The program that they managed to put together consisted of two phases, collecting input into the drafting of the Constitution, and submitting draft provisions to the public for comment.

93. Scott Carlson & Molly Inman, Forging a Democratic Constitution: Transparency and Participation in the 1998 Albanian Constitutional Process. In the Fall of 2003, the US Institute of Peace in cooperation with the UNDP organized a series of workshops with experts on constitution making practices. I was invited to participate as a country expert in the workshop of the Constitution making in Albania. In the workshop we discussed the findings of Scot Carlson’s paper, as well as debated the legitimacy questions of public participation and the politicization of the Constitution making process.
94. SCOTT CARLSON & MOLLY INMAN, FORGING A DEMOCRATIC CONSTITUTION: TRANSPARENCY AND PARTICIPATION IN THE 1998 ALBANIAN CONSTITUTIONAL PROCESS.
95. Id.
96. Id.
Throughout the duration of the program, its officers traveled all over Albania to generate public awareness and participation in the constitution making process. The results of these fora provided Commission members and its technical staff with a basic outline of the issues that the public considered important.97 In a second phase, the review of the constitution was largely done by individuals and organizations either in Albania or abroad.98 This public review was in addition to the drafting consultations provided by foreign experts.99 This approach by the ACCAPP provided at least a mechanism to ensure wider participation in the lawmaking process.

Although the Constitution drafting project involved input gathering on a national scale, it did not provide answers to the methodologies adopted to filter the information gathered from the public participation into the drafting. The problem was threefold. The first was the relation of the political class to the final outcome. The Democratic Party, the major opposition force in the country was opposed to a Constitution being drafted by the Socialist, whom they considered to have come to power through a Bolshevik like revolution after the collapse of the financial sector in early 1997. They did not consider the government to be legitimate, and they did not support the process as they perceived it to being controlled and manipulated by the Socialists and their allies, even among the international actors. Hence, the final product, the Constitution, which was adopted formally by a referendum on 28 November 2008, purposely coinciding with the National Independence Day, did not have the full backing of the political elite. The second was the perceived role of the international community in legitimizing the process and product. The public perception at that time was that while making a constitution is generally viewed with optimism, the process and product were perceived to be too much controlled by the government and the international actors. In other words, the public perception was that yes, it is good that a constitution is being drafted, but we do not have any influence in it whatsoever. The third was the relation of

97. Id.
98. Id.
99. Id.
selected expertise and opinions generated in town hall meetings and the final product. Despite the fact that this exercise formally introduced the concept of the public as a participant in the lawmaking process, and as such constituted a break from the established mentality of closed doors working groups, without adequate methodological framework and proper safeguards it did not guarantee that the public input would find its way in the final draft.\textsuperscript{100}

The legal framework establishes virtually no formal opportunities for public participation in governmental and parliamentary decision-making.\textsuperscript{101} The relationship between the government, NGOs, and the public is a complicated one. Because of the lack of procedures for incorporating public input, relations between the government and the public and NGO community depend heavily on the discretion of governmental officials. The predominant attitude among government and parliamentary officials is that public participation hinders the lawmaking process instead of improving it. Moreover, public administration tends to show interest in public participation in the lawmaking and policy preparations process only when it expects that the public will approve of their intended decisions.

The law on the Council of Ministers, and the regulations on Parliamentary commissions do not prohibit the participation of other experts in the drafting process, but in the absence of an explicit provision and mechanism to ensure it, the right to invite outside experts is left to the discretion of MPs. There is a contradiction in the proceedings of the working groups. When a particular law is part of a legal reform project, the project experts

\textsuperscript{100} For instance, Frankenberg’s article \textit{Stranger than Paradise}, provides an example of a typical working group. Two to three local experts and a foreign consultant, tasked with drafting a major law, such as the Administrative Procedure Code. This practice until early 2000 was well entrenched in the set up and proceedings of the working groups.

\textsuperscript{101} Law no. 9000, dated 30/01/2003 “On the Organization and Functioning of the Council of Ministers”. Article 24 of the law provides:

1. The initiators send the draft acts along with an explanatory memo on the goal, objectives and the substance of the draft act for opinion to the interested ministries and other institutions.
2. In any case, the draft acts, with the exception of those with an individual character, are sent for opinion to the Ministry of Justice, on the legality of their form and substance.
have a rather strong voice in the proceedings and in the final outcome of the law. However, if an interested NGO or a concerned community were to ask to participate in some of the meetings of the working groups, the decision to invite or not would be the chairperson’s alone. Taking into consideration the past practices of lawmaking, the need for public consultations should be explicitly provided in the law rather than left to the discretion of the administration. The only direct participation by the public in governance and government consists on electing representatives to the Parliament.

V. CHAPTER THREE: PROPOSALS FOR THE FUTURE OF THE LAWMAKING PROCESS

How legislation is made, and of course what it says, are equally important and complementary. Process has become equally as important as the content of the final document for the legitimacy of legislation.102 The previous Chapters analyzed the contradiction among rules, and the deficits of the legislative process. In this Chapter, I discuss some perspectives on filling the gap between the law in the book and the law in action through greater participation in lawmaking and evaluation of legislation. From a political science perspective, Archon Fung juxtaposes the representative democracy with the participatory democracy. Fung highlights the democratic deficit of the policy making process where preferences are not matched by outcomes and where deliberation or participation is absent from the lawmaking process. Underlying the potential disruption of representative institutions, Fung nonetheless proposes that “for countries where patron-client exchanges are highly stable, entrenched and reinforcing dynamics of a policy-

102. Writers such as Daniel Berkowitz and Katharina Pistor have respectively focused on the legality and effectiveness aspects of the legal reform, and the need for legal professionals to embrace the laws in order to ensure effectiveness. This is another occasion to emphasize that my focus in this paper has been on the need to ensure broader participation by the public in order to enhance the legitimacy of the process and products of legal reform projects, rather than their legality. Daniel Berkowitz et al., The Transplant Effect, 51 AM. J. COMP. L. 1, 163 (2003); Katharina Pistor, The Standardization of Law and Its Effect on Developing Economies, 50 AM. J. COMP. L. 1, 97 (2002).
making process, participatory reform may be an effective corrective.\textsuperscript{103}

In the context of an emerging right for public participation in democratic governance, Thomas Franck wrote that the legitimacy of governments will be measured by international law and process.\textsuperscript{104} The right to public participation in democratic governance exists today in international law. This right packs a moral punch but it lacks legal teeth and effective enforcement. Does this right extend from everyday governance to the process of constitution making? The United Nations Committee on Human Rights has recognized a specific right to participate in constitution making. The Aarhus Convention, even though a regional instrument, fortified the concept of public participation.\textsuperscript{105}


\textsuperscript{105} A ruling in 1991 of the UNCHR, acting in its judicial capacity to hear individual complaints under Optional Protocol I to the ICCPR, in the case of Marshall v. Canada (Human Rights Committee, CCPR/C/43/D/205/1986, 3 December 1991). This was a case brought in 1986 and decided five years later, first authorized a specific right to participate in constitution making as an undoubted part of public affairs. The right to participate in constitution making might logically be derived from the general meaning of “democratic participation” in the UN Declaration of Human Rights (1948, Article 21) and especially Article 25 of the ICCPR (a covenant agreed in 1966 and entered into force in 1976). Article 25 establishes a right to participate in public affairs, to vote, and to have access to public service: “Every citizen shall have the right and the opportunity . . . without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.” The right of public to participate was also recognized by the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25 June 1998.
A. International Arrangements on Participation and Evaluation

It is of interest to study how international law deals with the access to legal norms and what we can learn from the EU response. The right of public participation to legal norms and legislative process has been recognized in international law. Such an instrument is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. It was adopted on 25 June 1998, in the Danish city of Aarhus at the Fourth Ministerial Conference in the “Environment for Europe” process. The Convention, although it relates to the environmental issues, represents the most advanced instrument that regulates the right to public participation. Since signing the Convention in 1998, the EU has taken important steps to update existing legal provisions in order to meet the requirements of the Aarhus Convention by adopting directives for the Member States, but also for its own institutions. In particular, two directives\(^\text{106}\) concerning access to environmental information and public participation in environmental decision-making (“first” and “second pillar” of the Aarhus Convention) were adopted by the European Parliament and the Council in 2003. They have to be implemented in national law respectively by 14 February and 25 June 2005.

The Convention adopts a rights-based approach and establishes minimum standards to be achieved, but does not prevent any Party from adopting measures which go further in the direction of providing access to information, public participation or access to justice.\(^\text{107}\) Article 6 of the Convention establishes certain public participation requirements for decision-making on whether to license or permit certain types of activity listed in Annex I to the Convention. The “public concerned” is defined as “the public affected or likely to be affected by, or having an interest in, the


environmental decision-making,’ and explicitly includes NGOs promoting environmental protection and meeting any requirements under national law.  

The public participation requirements include: timely and effective notification of the public concerned; reasonable timeframes for participation, including provision for participation at an early stage; the right for the public concerned to inspect information which is relevant to the decision-making process free of charge; an obligation of the decision-making body to take due account of the outcome of the public participation; and prompt public notification of the decision, with the text of the decision and the reasons and considerations on which it is based being made publicly accessible. What is important in this picture for us is to take into consideration the spirit and scope of its provisions.

The aim of all legislative work is to produce relatively good laws, because to produce absolutely good laws means to attain justice and justice is an ideal. The mechanic process of adopting laws in Albania has contributed to a large number of adopted laws over a relatively short period of time. As the previous Chapters illustrated, this tendency has provoked a lack of transparency, and this also is reflected in the quality of legislation. Part of the blame can be attributed to the handicaps of the lawmaking process: i.e. the deficiencies in the functioning of the supply and demand scheme for legal norms, which contribute to what I call the inflation of legislation. The problems are also reflected in the inadequate time for reflection and reviews, as well as in a greater isolation between the Executive and other branches of the government.

According to the Council of Europe, evaluation of the effects of laws is a relatively recent development in Europe. Its growing importance is related to changes in the form of legislation. Modern legislation has taken the form of programs, which are targeted to achieve certain goals; therefore, the traditional verification of the legality of legislation should be gradually accompanied or

108. id.
109. id.
combined with the evaluation of the effects of legislation.\textsuperscript{111} The most frequently mentioned evaluation criteria are the effectiveness, efficacy and efficiency. The focus is on the content of the law rather than on the procedures of collecting the input of the target populations into the given legislation.

The approach taken by the Council of Europe with respect to evaluation of legislation restricts itself to the effect and the implementation of the legislation. Little is said about the need to evaluate the legislative process itself. This approach focuses on the technicality of the lawmaking process, leaving outside political, economical, and social factors that are the driving forces of legislation.\textsuperscript{112}

In this context, legislative evaluation is seen as an indispensable aspect of the democratic debate. In order to fully play its part in ensuring legal certainty, evaluation cannot be restricted to purely financial concerns or consistency of the legal order, but must also monitor how efficacious, efficient and effective a given norm is, as well as any other expected or unexpected effects. There should be provisions for evaluation at the time of \textit{travaux préparatoires}, so as to foresee the effects (\textit{ex ante} evaluation), and during the implementation, so as to be able to draw conclusions about the legislation’s content and the implementation methods (\textit{ex post} evaluation).\textsuperscript{113}

In this framework, evaluation of legislation is thought to be an element of the sociology of legislation as well as an essential part of legislative methodology. Unlike legislative drafting, it concerns the material and substantial aspects of legislation rather than its formal aspects. It is particularly concerned with the relation between normative contents and their consequences in the social

\begin{footnotes}
\item 111. \textit{Id.}
\item 112. \textit{Id.} Legislative evaluation is a necessary discipline, but it has still to be widely developed in all European countries. Every Council of Europe member state or candidate for membership should independently look into the question and set itself the goal, when drafting legislation, of establishing machinery that makes it possible to have a better understanding of the legislation’s impact. As part of its ADACS legal co-operation program, the Council of Europe might encourage and support these efforts by organizing both bilateral activities and discussion among all the countries in the program, and by developing, in partnership with national and NGO bodies concerned, networks for monitoring and exchange of information and experience . . . “
\item 113. \textit{Supra} note 110.
\end{footnotes}
realities, in the “real world.” Therefore, it is imperative to emphasize the nexus between the substance and procedure of lawmaking.

The analytical or theoretical model underlying the methodical approach to be used for preparing legislation considers the legislative process as a reiterative learning process. It is a process in which the evaluation of the effects of legislation is one of the fundamental prerequisites and tools for learning. A process, in which the responsiveness of the legislator to social reality and the social adequacy of legislative action should be guaranteed.

Taking into consideration that the Europeanization of legislation is the single biggest legal reform, much attention is needed to provide a scrupulous process of reviewing legislation initiated by the executive in the framework of the Europeanization of legislation. The establishment of the necessary domestic participatory and evaluation mechanism becomes relevant when considering that the EU does its homework quite well. Through the introduction of TAIEX programs in Albania, EU evaluates the Albanian legislation on an automatic basis. Every month, line ministries and the Ministry of European Integration are obliged to update a list of all normative acts adopted by the Council of Ministers and the Parliament in a database monitored by the European Commission TAIEX office. This process evaluates how many laws are adopted in a particular area and their level of compatibility with the acquis. During the implementation of the Stabilization and Association Process joint working groups and

114. Id.
115. Id.
116. In addition to international instruments on evaluating legislation, renowned law and development scholars, Bob and Ann Seidman, have done remarkable work in preparing manuals for lawyers on drafting and evaluating legislation. ROBERT SEIDMAN ET AL., LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS (Kluwer Law International 2001); and ASSESSING LEGISLATION: A MANUAL FOR LEGISLATORS (Boston University School of Law 2003).
117. TAIEX is the Technical Assistance and Information Exchange instrument managed by the Directorate-General Enlargement of the European Commission. TAIEX supports partner countries with regard to the approximation, application and enforcement of EU legislation. It is largely demand driven and facilitates the delivery of appropriate tailor-made expertise to address issues at short notice. http://ec.europa.eu/enlargement/taix/what-is-taiex/index_en.htm (last visited April 21, 2011).
committees evaluate the implementation of the agreement and *ex officio* as well as the enforcement of legislation. The concern here is not about preserving nationalist, or culturalist sensitivities. It is more about providing alternatives and achieving a higher standard of comparison and evaluation rather than the basic level of alignment with the *acquis*.

There are few aspects that merit attention when talking about the effectiveness of evaluation. What I find missing and consider worth noticing is the important question of the subjects of the evaluation. Answers to these questions raise identity prerogatives for the executive and parliament. In this context, taking into account the shift in power from the legislature to the executive branch, regulatory agencies and the courts, it is about time to give something back to the lawmakers.

**B. Reflections on Public Participation**

The typology of critique against public participation is usually made in the context of lawmaking initiatives in America. Whereas my argument does not involve direct democracy, but calls for greater participation in the lawmaking process using the existing institutions of the representative democracy, nonetheless it is worthwhile to bring up the critique and discuss how it is refuted. The critique against forms of direct democracy in lawmaking highlights the role of special interests in formulating policies, the inexperience and incompetence of voters in conceptualizing policy proposals and formulating laws, and the risk for infringing minority rights.  

In an empirical study, Elisabeth Gerber refutes the critique by showing that the evidence fails to support the claims that there are more special interests involved in lawmaking initiatives, and that the voters are uninformed.  

Furthermore, in the context of greater participation in the lawmaking process, an experiment was conducted in British Columbia where a Citizens’ Assembly was created by the Government of British Columbia with the unanimous support of the B.C. Legislature. It was an independent, non-partisan assembly of citizens who examined the province’s electoral system. The Citizens’ Assembly had 160 members, one man and one woman from each of B.C’s 79 provincial electoral districts (constituencies) plus two Aboriginal
could be a potential to harm minority interests, Gerner uses a Madisonian argument to conclude that risks could be mitigated by controlling the effects rather than the causes of antiminority tendencies.\textsuperscript{120}

According to Fuller, non-publication of law, contradictory rules, and a gap between law and implementation are among the elements that contribute to failing to make law.\textsuperscript{121} In the context of implementation, well-designed institutions are not the only answer, since the best institutions will fail in making law effective unless both officials and citizens display general attitudes of respect and compliance, unless, that is, they have a view of legal rules as binding.

Every single report on Albania evidences the relatively sound legal base, and the drastic lack of implementation. There are several factors that contribute to the failure of law, starting from socio-anthropological arguments on the attitude of Mediterranean populations towards formalized rules, lack of clarity in adopted legislation, lack of administrative capacities and resources, incoherence of proposed laws and of the system they intend to build, as well as a lack of political will to implement the reforms and recommendations of the international community. In a report about the state of the judiciary in Albania, the lack of professionalism and discipline, lack of implementation, conflicting and arbitrary legal interpretations, the lack of coherence and consistency in the law itself and its application form a set of

members. They were representative of the province as a whole, and worked for all British Columbians. Members were picked by random draw from a pool that reflected the gender, age and geographical make-up of British Columbia. They spent 11 months in 2004 studying electoral systems in use around the world, holding public hearings, accepting public submissions, and finally reached a decision on a new electoral system, which was put to voters in a referendum. The process was divided into three phases where they learnt about the electoral systems, held public hearings, and deliberated on the new system. This experiment emphasized the relevance of greater participation in the lawmaking process and the use of alternative mechanisms to the usual institutions of a representative democracy. Information available at http://www.citizensassembly.bc.ca/public/inaction (last visited April 21, 2011).

\textsuperscript{120} Id.

challenges for the law enforcement authorities. The list is long, and one can attribute the failure to almost anything. Distinguishing chaff from grain is the persuasiveness and cohesiveness of arguments. The “production” of laws, as commodities, has certainly negatively influenced their coherence and quality vis-à-vis clarity and precision. Legislative problems are universal problems; they should be dealt with in a multidisciplinary way, as they have a theoretical as well as a practical dimension.

The legislative loophole in the Albanian legislation regarding the participation in the lawmaking process has contributed to minimal initiatives to get the public to participate in the legislative drafting process throughout the years. Adding to the confusion, it has also led to inadequate publicizing of draft laws and poorly developed media contacts that would allow the process to be open to the public, not mentioning the failure to publish adopted law and by laws. With the exception of some isolated cases, the public generally has not played an active part in the process of legislative drafting. This pattern fuels the hypotheses that enacted laws lack sufficient transparency and are predestined not to be implemented.

In order to open this process and ensure that the public has a voice in the process of drafting legislation the executive should and in some sporadic cases has started working to provide proper conditions to achieve participation, especially through the open invitations via such simple mass media as internet. The lack of a clear obligation or the lack of capacities cannot constitute excuses for not allowing interested groups to play an active role in lawmaking. Developing the necessary legal standards for determining when public participation is required and educating the public about the importance of public participation in legislative drafting are of primary importance, and would directly

---


contribute to the quality and legitimacy of the laws. In the words of Vivien Hart “[t]he context of a traditional constitution, presumed to stand above and to structure democratic politics, the extension of democratic process to include free, open, and responsive discussion of the constitutional settlement itself represents a radical departure, but one that attempts to overcome the problems of entry of new participants and of an equal voice for all concerned regardless of their expertise.” It would also encourage citizens to participate in the various associations that would be involved in the process of commenting on legislation, thereby instilling important civic virtues.

Innovative ways to bring about great participation are usually commendable, but when in shortage, valuable tools can be used from other practices. Comparisons with the U.S. notice and comment practices can thus be a starting point. In order to make these methods work efficiently in practice, there must be proper methodological mechanisms guaranteeing sufficient and real participation. The most important ones are the dissemination of information (public notice of and access to the latest drafts, either through the production and publication of information leaflets or through media and internet coverage), the creation of concrete possibility of organizations and interested parties to comment on existing draft laws at various stages, and ensuring that hearings are held at a time and in a manner that it is truly possible for comments to be evaluated and the final decisions to be influenced.

It should be stressed that these are not simply matters of ensuring citizen rights, though they do enhance democratic principles. By allowing sufficient participation in the drafting process, the public administration can avoid considerable amounts

126. For an account of the need to adopt notice and comment procedure in European law see Francesca Bignami, The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment Comitology, 40 HARVARD INT’L L. J. 451 (1999) (Bignami identifies an inadequacy in the rulemaking procedures in the European Union that fuels the democratic deficit and argues for the adoption of a revised notice and comment procedure in order to allow for greater participation but for a reduced role of courts and interest groups in light of cross-cultural differences in beliefs and interest organizations).
127. OSCE, supra note 125.
of criticism after laws have been passed. Participation also ensures
the anticipation of a wider range of potential problems with the
draft laws, thus lessening the need to amend legislation at a later
stage. Despite the criticism of participatory-like arrangements and
their shortcomings in lawmaking procedures, the situations that I
analyzed earlier in the paper indicate an urgent need to reform the
reform. Extracting the legislative process from the incubator to a
more open and mature environment cannot help but bring healthier
products and legitimacy to them.

VI. CONCLUSION

The co-existence of parallel processes in the modernization
project, transformation and deliberation, formalism and
informalism, legality and legitimacy, is nothing new, but what is
experienced daily in most of the transitioning societies. The
relationship of local values with prescriptions from the center is
subject to a legitimacy test. In other words, there has to be a
process where the local permeates the universal, and where the
universal at the same time gradually influences the local.\textsuperscript{128}
Therefore, how law is made does matter. It matters whether groups
and the population at large are able to contribute to the process.
A claim of necessity for participation is based on the assumption
that the outcomes will have the legitimacy as coming from the
right way of channeling the political power that resides in
individuals. Thus participation has the potential, although not
exclusively, to become a criterion of a legitimacy process.
Lawmaking can no longer be confined exclusively to the domain
of “high politics” and negotiations among elites. What needs to be
avoided is exactly the tendency to favor legality over legitimacy.

\textsuperscript{128} See Glyn Morgan, \textit{The Idea of a European Superstate: Public
Justification and European Integration} (2005). Morgan discusses the
Europeanization process as one in which the periphery transform itself following
the conditions of the center, while simultaneously the center is transformed by
the periphery.

\textsuperscript{129} See Galligan, \textit{supra} note 32, at 23.